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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF CONNECTICUT,
Petitioner,

VS.

FREDERICK SCHONAGEL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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QUESTIONS PRESENTED

The Respondent was convicted by the State trial court of conspiracy to commit arson. In reversing that conviction the Supreme Court of Connecticut, inter alia, overturned the denial of a motion to suppress two metal containers found at the fire scene. The questions presented for review are:

1. Was the search and seizure without a warrant justified on exigent circumstances?

2. Was it plain error to find that the Respondent had a reasonable expectation of privacy in the near totally destroyed premises?

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The Petitioner, the State of Connecticut, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme court of the State of Connecticut issued in this proceeding on April 26, 1983.

OPINIONS BELOW

The judgment and opinion of the Supreme Court of Connecticut is reported at 189 Conn. 752 (1983) having been issued on April 26, 1983. The written opinion is reproduced as Appendix "A." The oral opinion of the trial court regarding the portion of the motion to suppress at issue here, was given on July 2, 1980, and is reproduced as Appendix "B."

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Connecticut was rendered on April 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

FACTS

The respondent was the owner of land and buildings located in the City of Bridgeport, Connecticut where he conducted a business known as Tire City. On September 23, 1977, at approximately 3:00 a.m. these premises were the subject of a devastating fire which virtually totally destroyed the two buildings situated on the site. Minutes after the blaze began the assistant fire chief arrived at the scene and could not believe the total involvement of the two buildings. Although these structures were 30 to 50 feet apart it seemed as if only one building was afire. In his thirty-one year career he had witnessed a fire of this magnitude on only one prior occasion. He concluded that the cause of the fire was due to gasoline.

A Bridgeport police officer arrived on the scene and observed people dragging a boy between 15 and 16 years of age from behind the tire store. His clothes were damp and had a strong odor of gasoline. The youth's name was John Velasquez.

From the time of the conflagration during the early morning hours of September 23, 1977 until about noon on September 26, 1977, no evidence was taken from the Respondent's premises. The police provided a patrolman to guard the area and prevent looting on a twenty-four hour basis from the morning of September 23rd to September 28, 1977. On September 24, 1977, the police on duty permitted a fire investigator for a consulting firm to enter the property. He took three soil samples on that date and on the morning of September 26th he secured seven additional samples. Testimony concerning the contents of these samples was precluded since the tests conducted on them were not performed by the expert witness nor completely in his presence and under his control. These were not the samples referred to by the Respondent in Paragraphs 2a and 2b of his motion to

suppress. (Appendix C) Thus although the trial court's ruling granted the Respondent's motion to suppress a soil and brick sample taken by a Bridgeport policeman on September 27, 1977, it is unlikely that they would have been admitted into evidence in view of the fate of the other samples.

The search and seizure which is the subject of this Petition emanated from a statement given to Inspector Fabrizi of the Bridgeport Police Department on the morning of September 26, 1977, by John Velasquez. This fifteen year old boy stated that during the evening of September 23, 1977, the Respondent told him and his brother that he wanted the place burned down, that the alarm was off and that the white van had six five gallon gasoline cans. The Respondent gave his brother, Anderson, a set of keys. After midnight he and his brother drove to the Tire City. From the white van in the service area they obtained gasoline cans and began dispensing it throughout the area including the warehouse. He ignited the gasoline in the warehouse and recalls waking up in the hospital. At the time Velasquez gave this statement to Inspector Fabrizi the Tire City premises were in the process of being demolished since on September 23, 1977, during the morning hours the City's building inspector inspected and found the storage area to be completely demolished and near collapse. He found the larger building was in serious structural condition. Only one wall was standing and the roof was twisted and in danger of collapsing. Due to the hazardous condition he ordered the demolition.

Three days later on September 26, 1977, Inspector Fabrizi knew that the debris was being carted away and therefore believing that he was faced with exigent circumstances ordered a policeman to attempt to recover any five gallon can which could be used to transport gasoline. No search and seizure warrant was ever issued and all proceedings were on the basis of a warrantless search. Inspector Fabrizi cited the exigent circumstances as the demolition of the site and the removal of the debris from the premises. While this work was in progress the policeman selected by the Inspector and another who assisted him searched through the rubble with a stick and located two

five gallon cans. The search consumed approximately one hour. A second warrantless search conducted the next day, September 27, 1977, led to the seizure of brick and soil samples. The ruling on the motion to suppress is not here challenged so far as it prevented the use of this evidence at trial. The issue here is limited to the admissibility of the two five gallon cans based on the premise of no reasonable expectation of privacy and exigency. It is submitted that the Connecticut Supreme Court's designation of those cans as "two crushed and corroded metal containers" is accurate.

RULINGS BELOW

By Amended Information dated June 11, 1980, the Respondent was charged with conspiracy to commit arson in the second degree as a result of the Tire City fire. The specific criminal statutes are Connecticut General Statutes 53a-48 and 53-a-112. *State* v. *Schonagel,* 189 Conn. 752 (1983). (Appendix A).

By pleading filed on December 17, 1979, the Respondent's counsel alleged in a motion to suppress, in part, that the seizure of the cans violated the prohibition against unreasonable search and seizure as guaranteed by the fourth and fourteenth amendments to the United States Constitution and the applicable section of the Connecticut Constitution. (AppendixC).

During the course of the trial the court held an evidentiary hearing on the motion to suppress. On July 2, 1980, the trial court ruled in an oral decision that the motion to suppress the two metal cans should be denied. (Appendix B) No finding of fact was made and the court's brief statement indicated its belief that the factual situation created circumstances wherein it was reasonable to seize the cans.

Thereafter the jury found the Respondent guilty as charged and judgment was entered on November 7, 1980. The Respondent appealed to the Connecticut Supreme Court raising several issues including the denial of the moton to suppress the two metal containers.

On April 26, 1983, the Connecticut Supreme Court reversed the trial court's ruling on the motion to suppress and set aside the conviction. (Appendix A) The court concluded that under the circumstances the State did not bear its burden of proving exigency to justify the warrantless search and that it was not plain error to find that the owner of the premises still maintained a privacy interest in the fire-ravaged property. The court then proceeded to discuss other issues not pertinent to this Petition. (Appendix A)

ARGUMENT

REASONS FOR GRANTING THE WRIT

The Petitioner, the State of Connecticut, here respectfully submits that its highest court has incorrectly decided an issue of federal constitutional law. This decision appears to be in conflict with previous rulings of this Court. In cases concerning the near destruction of property the scope of *Michigan* v. *Tyler,* 436 U.S. 499 (1978), could be redefined with more precision as to the variants of exigency and the type of destruction required to wrest the right of privacy away from the owner-occupant of said premises.

I. The Search and Seizure of the Two Metal Containers Was Valid Due to Exigent Circumstances

It is now textbook law that the Fourth Amendment proscribes all unreasonable searches and seizures and "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." *Mincey* v. *Arizona,* 437 U.S. 385, 390 (1978); *Katz* v. *United States,* 389 U.S. 347, 357 (1967). One of those exceptions to the principle is that of exigency since it has been "recognized that a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant." *Michigan* v. *Tyler,* 436 U.S. 499, 509 (1978). The reason the deviations

from the rule are so few is that the "basic purpose of this Amendment. . . is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camera* v. *Municipal Court*, 387 U.S. 523, 528 (1967).

As to this argument it is clear that the search conducted by the police to locate two metal containers was conducted approximately 81 hours or about 3½ days after the origin of the fire. There was no warrant and the authorities apparently did not seek the consent of the owner. Faced with an emergency the police in good faith relied on exigency in the effort to secure this evidence before it was destroyed or carted away by the workmen. Their efforts in view of the circumstances rendered the search and seizure reasonable.

One of the arsonists had just given a statement which indicated the cause of the fire. For the first time the police were aware of the allegation that five gallon gasoline cans were used to transport and distribute the gasoline. Had they waited to apply for a warrant the crucial corroborating evidence may have been placed on the payloader which was clearing the site and have been lost forever.

The demolition process was initiated by a city building inspector since he determined the debris to be a hazard to the public. At all critical times a policeman was on duty at the scene and, in fact, there was a twenty four hour guard. On the morning of John Velasquez's statement, September 26, 1983, the demolition people were at work.

Faced with these circumstances the Inspector in good faith based on his knowledge decided to act without a warrant and immediately search for the cans lest the alleged evidence be lost. It is hindsight to maintain that the Inspector's decision was unreasonable. Perhaps the cans would have still been on the property if the procedure for a warrant had been pursued. However the decisive factor is that we will never know the answer to that supposition. The Fourth Amendment only precludes unreason-

able searches and seizures. This demonstratively was a reasonable search entered into in good faith.

The Connecticut Supreme Court found that the State did not satisfy its burden of proving exigent circumstances reasoning that since the demolition had been halted for a period two days previously at the request of insurance inspectors the police could have effectuated a cessation of activity and thereby gained time to secure a warrant. The flaw in this argument is that we do not know the position of the building inspector who ordered the demolition. It requires speculation on several issues and presupposes the fact that the building inspector would have stopped the demolition at the behest of the police. On such tenuous hooks constitutional principles should not be decided.

II. It Was Plain Error to Hold That The Respondent Had A Reasonable Expectation Of Privacy In The Nearly Destroyed Structure

It is here submitted that the Connecticut Supreme Court's opinion was constitutionally incorrect in deciding that it was not plain error to find that the Respondent despite the twisted steel of his buildings and the collapsing walls and the demolition efforts still possessed a privacy right in the premises. The individual's right to an expectation of privacy as discussed in *Katz* was defined as: "For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. (Citations omitted.) But what he seeks to preserve as private even in an area accessible to the public, may be constitutionally protected." *Katz* v. *United States,* supra, 351-52. The prerequisites for the reasonable expectation of privacy to come within the shelter of the fourth amendment are: (a) that the person involved exhibit an actual (subjective) expectation of privacy, and (b) that such expectation is recognized (by society) as "reasonable." Id., at 361. These precepts apply to commercial buildings as well as private homes. *Marshall* v. *Barlow's Inc.,* 436 U.S. 307, 311 (1978). The issue is simply whether the Respondent was imbued with a reasonable expectation of privacy

at the time of the search. The Petitioner contends that there existed no reasonable expectation of privacy on September 26, 1977, at the time of the search for the metal cans, and it was plain error to so find.

While it is clear that the Respondent was the owner of the land and buildings there was no evidence at the hearing on the motion to suppress to indicate that he had resumed business on the site at the time of the search. The scene was under constant police protection. The building inspector stated that the buildings were 90% collapsed and were in a serious structural and hazardous condition. By the weekend prior to the search the structures were flat out or levelled. At the time the police conducted the limited warrantless search trucks were in the process of removing the debris.

The Respondent produced no evidence at the hearing on the motion to suppress. None of the State's evidence revealed any act of the owner which indicated that he exhibited an actual (subjective) expectation of privacy that society would recognize as "reasonable." There was no evidence that he attempted to board up the premises, restrict entry, or perform any one of the many acts which one who has an interest in premises can be expected to achieve in demonstration of his reasonable expectation of privacy. In conclusion the Petitioner maintains that it was plain error of constitutional significance that a businessman-landowner under the facts of this case can have a reasonable expectation of privacy.

CONCLUSION

For the reasons stated above, this Court should grant certiorari in this case to review the questions presented herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, on this 23rd day of June, 1983, to Counsel for the Respondent, Frederick Schonagel: Salvatore C. Depiano, Esquire, and Daiga G. Osis, Esquire, DePiano and Palmesi, P.C., 56 Lyon Terrace, Bridgeport, Connecticut 06604.

/s/Richard F. Jacobson
RICHARD F. JACOBSON

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PETITIONER'S APPENDIX

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APPENDIX A

Opinion of the Supreme Court of Connecticut

State of Connecticut v. *Frederick Schonagel*
(10498)

Speziale, C. J., Peters, Healey, Shea and Grillo, Js.

The defendant was convicted of the crime of conspiracy to commit arson in the first degree following a fire which destroyed the two buildings in which he operated a tire dealership in the city of Bridgeport. Three days after the fire, while the buildings were being demolished and the debris removed on orders from the Bridgeport building inspector, the police, without a warrant, searched for and seized two metal containers which a confessed perpetrator of the crime had told the police were gasoline cans used in starting the fire. The next day, the police seized a brick and soil samples. The trial court granted the defendant's motion to suppress the brick and soil samples but denied the motion to suppress the two containers. On the defendant's appeal to this court, *held* that there not being sufficient exigent circumstances to excuse the police from the requirement of obtaining a search warrant, the trial court erred in refusing to suppress the metal containers and because that evidence may well have played a major role in the jury's deliberations, the error was not harmless.

The trial court properly denied the defendant's motion to dismiss predicated on the state's failure to disclose before trial three allegedly exculpatory statements given to the police during their pretrial investigation. Even were that information material, the defendant's proper remedy here would have been to seek either a continuance once the information had been made available to him, or a declaration of mistrial.

The trial court admitted into evidence testimony to the effect that the defendant had purchased for his own use some $50,000 worth of cocaine. The state argued on appeal that that evidence

was probative of a financial motive for the arson. The defendant argued that, absent evidence that the defendant could not otherwise have afforded the cocaine, that evidence was irrelevant and inflammatory. Because other evidence had been presented, without objection, concerning the defendant's use of drugs, some of which evidence defense counsel himself had elicited, any additional prejudice resulting from the admission of the challenged testimony was insignificant; accordingly, the trial court did not err in admitting that evidence.

Reasonable expectation of privacy, discussed.

Argued December 8 — decision released April 26, 1983.

Information charging the defendant with the crime of conspiracy to commit arson in the second degree, brought to the Superior Court in the judicial district of Fairfield at Bridgeport and tried to the jury before *Callahan, J.;* verdict and judgment of guilty and appeal by the defendant to this court. *Error; new trial.*

Daiga G. Osis and *Salvatore C. DePiano,* for the appellant (defendant).

Richard F. Jacobson, assistant state's attorney, with whom, on the brief, were *Donald A. Browne,* state's attorney, and *Frank S. Maco,* assistant state's attorney, for the appellee (state).

Peters, J. The principal issue in this case is the admissibility into evidence of certain items seized, on a suspicion of arson, during a belated warrantless search of burnt-out premises. The defendant, Frederick Schonagel, is appealing from his conviction, after a jury trial, of conspiracy to commit arson in the sec-

ond degree in violation of General Statutes §§ 53a-48 (a) and 53a-112 (a) (1) (B) (2).[1]

The jury could reasonably have found the following facts. The defendant owned and operated Tire City, a tire dealership located in two main structures on Boston Avenue in Bridgeport. The defendant had insured the business in an amount in excess of $500,000. On Thursday, September 22, 1977, the defendant procured the services of a Tire City employee, Anderson Velasquez, and his younger brother, John Velasquez, to set fire to the premises. Urging them to obtain six five-gallon containers full of gasoline, the defendant promised to pay the Velasquez brothers $20,000 out of the $500,000 insurance payment he hoped to collect. Later that evening, the defendant gave Anderson the keys to Tire City, as well as more detailed instructions on how to set the fire.

Around midnight, the Velasquez brothers drove to Tire City. They poured gasoline from the containers throughout the two buildings, leaving trails of the flammable liquid to the entrances. At around 3 a.m. on Friday, September 23, 1977, the gasoline ignited, causing a tremendous explosion. Anderson fled, John was knocked unconscious, and in the ensuing conflagration both buildings were destroyed.

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[1]"[General Statutes] Sec. 53a-48. Conspiracy. Renunciation. (a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

"[General Statutes (Rev. to 1979)] Sec. 53a-112. Arson in the Second Degree: Class C Felony. (a) A person is guilty of arson in the second degree when he starts a fire or causes an explosion: (1) With intent to destroy or damage a building...(B) whether his own or another's, to collect insurance for such loss; and (2) such act subjects another person to a substantial risk of bodily injury or another building to a substantial risk of destruction or damage."

The defendant raises four issues on appeal. First, he claims that the trial court erred in admitting into evidence two crushed metal containers, seized by the police from the debris of Tire City during a warrantless search on September 26, 1977, because their admission violated his right to be free from unreasonable searches and seizures, as that right is guaranteed by the fourth and fourteenth amendments to the United States constitution and article first, § 7, of the constitution of Connecticut. Second, he claims the trial court erred in admitting the same containers into evidence as exhibits, because the state was unable to identify them as the gasoline cans used in the commission of the crime. Third, he claims the trial court erred in denying his motion to dismiss, because the state's failure to disclose the names of witnesses who had made allegedly exculpatory statements to the police had deprived him of due process and a fair trial. Fourth, the defendant claims the trial court erred in permitting testimony as to his use of cocaine, because the probative relevance of such evidence of a prior bad act was outweighed by its prejudicial impact. We will consider each of these claims in turn.

I

The facts concerning the contested search and seizure are essentially undisputed. Officials of the Bridgeport fire and police departments suspected arson as soon as they arrived at the scene on Friday, September 23, 1977, within minutes after the explosion occurred. The magnitude and intensity of the flames and the simultaneity of the fires in separate buildings were consistent with the use of an accelerant such as gasoline in starting the fires. Moreover, when the unconscious John Velasquez was dragged from one of the fiery buildings, the police observed that he smelled strongly of gasoline. A patrolman was immediately stationed at the scene to prevent looting and the premises remained guarded twenty-four hours a day until September 28, 1977.

Later on that Friday morning, the Bridgeport building inspector determined that what remained of the structure was in dan-

ger of imminent collapse and ordered it demolished. At the request of the defendant's insurer, however, demolition was postponed for a half hour to permit measurements to be made and photographs to be taken of the premises. Thereafter the buildings were flattened. Work was then discontinued during the weekend of September 24 and 25.

On Monday morning, September 26, 1977, the demolition contractor, using trucks, payloaders, and bulldozers, continued dismantling what remained of the buildings and began carting away the debris. On the same Monday, at about noon, John Velasquez made a statement to the police confessing his part in the arson and implicating the defendant. In his statement, he referred to the gasoline cans used in starting the fire. Without any effort to obtain a warrant, an officer was immediately dispatched to the Tire City premises to search for the cans. Within an hour, two crushed and corroded metal containers were discovered. The warrantless search continued the following day, and resulted in the seizure of a brick and soil samples.

During the trial, the defendant made a motion to suppress the seized articles; i.e., the containers, the brick and soil samples. The state, in opposing the motion, argued that the defendant no longer possessed a reasonable expectation of privacy in the premises at the time of the search, and that, with respect to the metal containers, the exigent circumstances created by the ongoing removal of debris made it necessary to forgo the obtaining of a warrant. Without issuing a memorandum of decision, the trial court granted the motion to suppress the brick and soil particles, citing *Michigan* v. *Tyler,* 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978), in which the United States Supreme Court held that once a reasonable time after a fire has elapsed, additional entries to investigate the cause of the fire must be pursuant to a warrant. Id., 511. The motion to suppress the metal containers was denied.

On appeal, the state concedes that the search conducted for the gasoline cans may be sustained, if at all, only by the exigent circumstances surrounding it. The defendant claims (a) that no

exigent circumstances existed, (b) that in light of the state's continuing failure to obtain a warrant as the search persisted through the following day, the claim of exigency is pretextual, and (c) that whatever exigency existed on September 26 resulted from the state's failure to act expeditiously in investigating the arson once it had probable cause to obtain a search warrant, which the defendant claims was already established on Friday, September 23. Because we agree with the defendant that the state did not establish the existence of exigent circumstances, we do not consider his second and third claims of error on this aspect of his appeal.

According to well-settled principles, the fourth amendment, and its state counterpart, article first, § 7, forbid as unreasonable most searches that are conducted outside of the judicial process. *Mincey* v. *Arizona,* 437 U.S. 385, 390, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978); *Coolidge* v. *New Hampshire,* 403 U.S. 443, 481, 91 S. Ct. 2022, 29 L. Ed. 2d 564, reh. denied, 404 U.S. 874, 92 S. Ct. 26, 30 L. Ed. 2d 120 (1971); *Katz* v. *United States,* 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *State* v. *Zindros,* 189 Conn. 228, 236-37, A.2d (1983); *State* v. *Federici,* 179 Conn. 46, 53, 425 A.2d 916 (1979). Because the requirement of obtaining a warrant is the rule, and exceptions to that requirement are few and jealously guarded, anyone claiming an exemption from that requirement bears the burden of showing the need for it. *Arkansas* v. *Sanders,* 442 U.S. 753, 759-60, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979); *United States* v. *Bruton,* 647 F.2d 818, 822 (8th Cir.), cert. denied, 454 U.S. 868, 102 S. Ct. 333, 70 L. Ed. 2d 170 (1981); *State* v. *Zindros,* supra, 237; *State* v. *Krause,* 163 Conn. 76, 80, 301 A.2d 234 (1972); *State* v. *Keeby,* 159 Conn. 201, 206, 268 A.2d 652 (1970), cert. denied, 400 U.S. 1010, 91 S. Ct. 569, 27 L. Ed. 2d 623 (1971). Nonetheless, there are circumstances where the societal costs of obtaining a warrant outweigh the reasons for recourse to a neutral magistrate. When confronted with emergency situations in which the delay necessary to obtain a warrant creates a risk of loss or destruction of evidence, courts have recognized that such exigency makes a warrantless search not unreasonable. *Schmerber* v. *California,* 384 U.S. 757, 770-71, 86 S. Ct. 1826, 16 L.

Ed. 2d 908 (1966); *United States* v. *McEachin*, 670 F.2d 1139, 1144 (D.C. Cir. 1981); *State* v. *Januszewski*, 182 Conn. 142, 152, 438 A.2d 679 (1980); *State* v. *Krause*, supra, 81. See 2 LaFave, Search and Seizure § 6.5 (1972).

We recognize that exigency is not the only basis upon which warrantless searches may be sutained, but we believe it to be the only issue properly before us on the present appeal. As this case comes to us, there is no occasion to find either an abandonment of the defendant's reasonable expectation of privacy or a valid consent to the search that took place.

When the trial court ordered suppression of the brick and soil particles seized by the police on September 27, it necessarily determined, as a matter of fact, that the defendant retained a reasonable expectation of privacy in the searched premises at that time. See *State* v. *Zindros*, 189 Conn. 228, 236, 239-40, A.2d (1983). The state has taken no issue on this appeal with that order. Consequently the state has not argued that the defendant's privacy interest was different on September 26, with regard to the containers whose seizure was upheld, than on the following day, with regard to the seizure of the brick and soil particles which were suppressed. There can be no doubt that the trial court ruled on the privacy issue on all the items seized in the defendant's favor.

Because the defendant had obtained a favorable ruling on the privacy issue, and because the state in its brief conceded that the search could be sustained only by a finding of exigent circumstances, we would be justified in overturning the trial court's finding of fact on privacy only if we found it to be plain error. The record does not support such a conclusion. There was evidence at the trial that the defendant owned not only the buildings and the business of Tire City but the underlying real property as well. A representation, at oral argument, that, at the time of the search, the defendant had recommenced doing business on the premises was not challenged by the state. This evidence, while not voluminous, suffices to sustain the trial court's ruling in the present procedural circumstances.

There is even less in the record concerning the defendant's consensual abandonment of his right of privacy. There was some evidence that the defendant's insurer, by virtue of the insurance contract, had a right to inspect the premises in the event of a fire. The state has not argued that consent to entry, given to one person or class of persons, automatically confers license upon the police to enter the premises in search of evidence of criminal conduct. The authorities are to the contrary. See *Lo-Ji Sales, Inc.* v. *New York,* 442 U.S. 319, 329, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979); *Lewis* v. *United States,* 385 U.S. 206, 211, 87 S. Ct. 424, 17 L. Ed. 2d 312 (1966), reh. denied, 386 U.S. 939, 87 S. Ct. 951, 17 L. Ed. 2d 811 (1967).

It is true that at the time the search occurred, the defendant's buildings had been substantially demolished and their component parts and contents were being removed from the premises. In determining whether the defendant retained a reasonable expectation of privacy in the underlying premises, however, the issue is not whether "a given 'area,' viewed in the abstract is 'constitutionally protected....' " *Katz* v. *United States,* supra, 351. But cf. *State* v. *Stavricos,* 506 S.W.2d 51 (Mo. Ct. App. 1974); *State* v. *Aragon,* 89 N.M. 91, 547 P.2d 574 (1976). Rather, the issue is whether the disputed search violated the expectation of privacy upon which the defendant justifiably relied. See *Katz* v. *United States,* supra; 1 LaFave, supra, § 2.2, p. 273 (1972). What an individual seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *Katz* v. *United States,* supra, 351-52.

In the present case, the condition of the premises at the time of the search resulted from both the fire and the dismantling operation ordered by the Bridgeport building inspector. The extent of the destruction produced by the fire alone is not the subject of our inquiry. It suffices to note that a fire does not necessarily diminish the owner's reasonable expectation of privacy in the burned building. See *Michigan* v. *Tyler,* supra, 506; *State* v. *Zindros,* supra, 242. The dismantling operation was undertaken based on a hazard to public safety perceived upon inspection by the municipal administrator competent to make

such a determination. The United States Supreme Court has recognized that inspections undertaken to abate dangerous conditions, "because [they]...are neither personal in nature *nor are aimed at the discovery of evidence of crime*,...involve a relatively limited invasion of the urban citizen's privacy." (Emphasis added.) *Camara* v. *Municipal Court,* 387 U.S. 523, 537, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967); see also Reich, "Midnight Welfare Searches and the Social Security Act," 72 Yale L.J. 1347 (1963). It follows that the remedial operations which are the natural result of such an inspection do not necessarily attenuate further the owner's expectation of privacy.[2] In finding the defendant retained such an expectation, the trial court might well have concluded that in the confused aftermath of the blaze the defendant did not see the full implication, as far as his privacy interests were concerned, of the dismantling operation. His presence on the premises, at the time of the search, is as consistent with exercise of his right to privacy as it is with his abandonment of any such expectation. We cannot say, under the circumstances, that the court's finding was plainly in error.

The question was before us is, therefore, whether the trial court was correct in its determination that exigent circumstances excused the failure of the police to obtain a warrant before they searched the remains of the Tire City premises on September 26. We recognize that the existence of exigent circumstances is a question of fact; *United States* v. *Brock,* 667 F.2d 1311, 1318 (9th Cir. 1932); *United States* v. *Williams,* 630 F.2d 1322, 1327 (9th Cir.), cert. denied sub nom. *Murchison* v. *United States,* 449 U.S. 865, 101 S. Ct. 197, 66 L. Ed. 2d 83 (1980); and that we are bound to uphold the trial court's denial of the defendant's motion to supress if there is a reasonable view of the evidence that will sustain it. *United States* v. *Williams,* supra, 1327; see

---

[2]The state, in its brief, concedes that the search by the police was not "motivated by a need to correct a potentially dangerous condition on the premises or to locate any objects which could possibly cause a future fire. The safety of surrounding premises or people was not the moving factor."

State v. *Zindros,* supra, 238. We therefore accept as proven the state's contention that, at the time when the police learned of the existence of the gasoline cans, their imminent removal from the searched premises was a distinct possibility. On the present record, however, that possibility does not suffice to establish that there was then an emergency "which would render a search ineffective if delayed by the time necessary to get a warrant." *State* v. *Krause,* supra, 81.

The present record rebuts exigency because it contains nothing to show that it was impossible or unreasonable for the police to obtain a temporary halt to the removal of debris while they went to get a warrant. Apparently the police made no such effort. The previous Friday, according to the evidence, razing of the burnt-out structure had been halted at the request of insurance investigators, even after the building inspector had determined the structure to be a hazard to the public. There was no evidence that, on the Monday of the search, a delay in completion of the removal work would have endangered the public safety, would have created additional danger, or would otherwise have been unreasonable. See *United States* v. *Gargotto,* 510 F.2d 409, 411 (6th Cir. 1974), cert. denied, 421 U.S. 987, 95 S. Ct. 1990, 44 L. Ed. 2d 477 (1975). Since a police officer was already on the premises, he could have ensured that no evidence would be removed during the short time that obtaining a warrant would have taken. *United States* v. *McEachin,* 670 F.2d 1139, 1146 (D.C. Cir. 1981). We note, as have other courts, that it is more difficult to demonstate exigency when the claimed risk relates to the fear of removal rather than of destruction of evidence that the police want to seize without a warrant. *United States* v. *Rubin,* 474 F.2d 262, 268 (3d Cir.), cert. denied sub nom. *Agran* v. *United States,* 414 U.S. 833, 94 S. Ct. 173, 38 L. Ed. 2d 68 (1973); *People* v. *Smith,* 5 Ill. App. 3d 341, 350, 275 N.E.2d 480 (1971). See 1 LaFave, supra, § 3.2, p. 449. When there are reasonable alternatives to a warrantless search, the state has not satisfied its burden of proving exigent circumstances. *United States* v. *Kunkler,* 679 F.2d 187, 191-92 n.3 (9th Cir. 1982); *United States* v. *Adams,* 621 F.2d 41, 44-45 (1st Cir. 1980); *United States* v. *Dias-Segovia,* 457 F. Sup. 260, 273 (D.

Md. 1978). The exception for exigency, like other exceptions to the warrant requirement, is limited in reach "to that which is necessary to accommodate the identified needs of society." *Arkansas* v. *Sanders,* 442 U.S. 753, 760, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979); *Mincey* v. *Arizona,* 437 U.S. 385, 393, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978); *Coolidge* v. *New Hampshire,* 403 U.S. 443, 455, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).

The state contends that even if the trial court's failure to suppress the metal containers was erroneous, the error was harmless. We cannot agree. As the state acknowledges, where the error of the trial court intrudes upon the constitutional rights of the accused, it is the state's burden to show that the error was harmless beyond a reasonable doubt. *State* v. *Truppi,* 182 Conn. 449, 465, 438 A.2d 712 (1980), cert. denied, 451 U.S. 941, 101 S. Ct. 2024, 68 L. Ed. 2d 329 (1981); *State* v. *Sorbo,* 174 Conn. 253, 257, 386 A.2d 221 (1978).

In this case, the metal containers served to corroborate the only testimony, that of the Velasquez brothers, which unequivocally implicated the defendant in the conspiracy with which he was charged. It is true that defense counsel vigorously cross-examined these witnesses concerning alleged inconsistencies in their testimony and as to their respective criminal activities and records. Nonetheless, we recognize, as do the commentators, that the containers themselves, present with the jury in the jury room, may well have played a major role in the jury's deliberations. "Real proof often has enormous apparent probative force because the lay trier may lose sight of the fact that its connection to a party may depend upon the credibility of an authenticating witness." 5 Weinstein's Evidence § 901(a)[01] (1982). "[T]here is a general mental tendency, when a corporal object is produced as proving something, to *assume, on sight of the object, all else that is implied in the case* about it." (Emphasis in original.) 7 Wigmore, Evidence (Chadbourn Rev. 1978) § 2129, p. 704; see McCormick, Evidence (2d Ed. 1972) § 212, pp. 524-25. We conclude that we cannot find the error harmless in the present circumstances. See *State* v. *Onofrio,* 179 Conn.

23, 32, 425 A.2d 560 (1979); *State* v. *Acklin*, 171 Conn. 105, 116, 368 A.2d 212 (1976).

II

Even if the search had not violated the defendant's constitutional rights, the defendant claims that admitting the two metal containers into evidence was error because there was an insufficient evidentiary foundation for their identification. Since we have determined the inadmissibility of these containers on constitutional grounds, we need not consider this claim of error.

III

The defendant's third claim on appeal is that the trial court erred in denying the defendant's motion to dismiss on grounds of the state's failure to disclose, until the trial was under way, three allegedly exculpatory statements made to the police during their pretrial investigation. The statements established the following: that a man resembling John Velasquez was seen in a Howard Johnson's restaurant shortly before the explosion on September 23, 1977; that two males were seen running from the vicinity of Tire City shortly after the explosion; and that a black or Hispanic man was seen running from the scene after the explosion, and that he got in a car and drove away. The defendant claims that the evidence contained in these statements was exculpatory in that (a) it contradicted testimony of the Velasquez brothers than John Velasquez had visited the Howard Johnson's restaurant at 9:30 p.m. to hear the defendant's proposal and had not subsequently returned there and (b) it tended to contradict the state's theory that the arson was committed by only two individuals.

The statements have now been disclosed to the defendant. Any prejudice to his defense which resulted from their nondisclosure may be avoided upon retrial. It is therefore necessary only to determine whether the trial court erred in denying the defendant's motion to dismiss. We conclude that it did not.

It is undisputed that the state has both a statutory and constitutional obligation to disclose all material evidence it possesses that is favorable to an accused. See *United States* v. *Agurs,* 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); General Statutes § 54-86c; *State* v. *Packard,* 184 Conn. (42 CLJ 48, pp. 5, 10-11) 439 A.2d 983 (1981). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States* v. *Agurs,* supra, 109-110; *State* v. *Bember,* 183 Conn. 394, 405, 439 A.2d 387 (1981).

We are not persuaded that the undisclosed material created a reasonable doubt that did not otherwise exist. State v. *Bember,* supra, 405-407.[3] Even if we were to assume that the undisclosed information was material, the proper remedy in the circumstances of the present case would have been an order for a continuance once the statements were made available or a declaration of mistrial. See Practice Book § 747.[4] The defendant did not request these remedies. The trial court therefore properly denied the defendant's motion to dismiss.

---

[3]We note that the declarants of two of the undisclosed statements were called as witnesses at trial where their testimony reiterated the contents of their prior statements. The third declarant, who had witnessed the flight of two males, was unavailable to testify at trial; however, a defense witness testified that he saw four Hispanic youths fleeing the scene shortly after the fire.

[4]Practice Book § 747 (formerly § 2158) provides: "Sanctions For Failure To Comply. If the prosecuting authority fails to comply with Sec. 740, the judicial authority may, on motion of the defendant or on his own motion, grant appropriate relief, which may include one or more of the following: (1) Requiring the prosecuting authority to comply; (2) Granting the defendant additional time or a continuance; (3) Relieving the defendant from making a disclosure required by Sec. 756, prohibiting the prosecuting authority from introducing specified evidence, or dismissing the charges; or (4) Entering such other order as he deems proper."

IV

The defendant's fourth and final claim is that the trial court erred in admitting and failing to strike testimony of Robert Kettles that the defendant purchased for his own use $50,000 worth of cocaine in the six-month period prior to the fire. The state argues on appeal that the large expenditure is probative of motive, in that it establishes a financial incentive to commit the arson. The defendant claims that absent evidence that he could not otherwise afford the expenditure, the testimony is irrelevant and inflammatory. Because the issue is likely to arise on retrial, we consider it now.

Our review of the record indicates that on at least three occasions prior to Kettles' testimony, the jury heard testimony that the defendant used drugs, including cocaine. No objection was raised by defense counsel at those times. On one of those occasions, the testimony concerning the defendant's use of drugs was elicited by defense counsel himself. Under the circumstances, the additional prejudice that might have resulted from Kettles' testimony was insignificant. The trial court properly admitted the evidence and denied the motion to strike.

If the defendant, upon retrial, properly preserves an objection to this testimony, it will be the responsibility of the trial court carefully to balance the relevance and the prejudicial impact of evidence of drug use. The trial court will have to consider to what extent an expensive drug habit is probative of motive to commit arson, and to what extent the state has proven that the defendant cannot afford his habit. Especially if the probative value of such testimony is found to be minimal, the trial court will have to weigh carefully its potential for seriously prejudicing the jury against the defendant. *State* v. *Carter,* 189 Conn. 631, 642-44, A.2d (1983); State v. *Nardini,* 187 Conn. 513, 521-22, 447 A.2d 396 (1982); *State* v. *Marquez,* 160 Conn. 47, 52, 273 A.2d 689 (1970). Because we cannot predict the course of a new trial, we cannot give further direction on this issue at this time.

There is error, the judgment is set aside and a new trial is ordered.

In this opinion the other judges concurred.

APPENDIX B

Exerpt of Transcript, July 2, 1980

Superior Court

FAIRFIELD COUNTY AT BRIDGEPORT

JULY 2, 1980

No. 25,455

STATE OF CONNECTICUT,

VS.

FREDERICK SCHONAGEL,

BEFORE: HONORABLE ROBERT J. CALLAHAN,
Judge

THE COURT: Yes, sure.

On number two, sample soil and piece of brick, I see a problem with Tyler versus Michigan. The motion to suppress soil sample and brick is granted.

As to the two five gallon cans seized on 9/26, the factual situation appeared to me to create a circumstance where it was reasonable for those to be seized. The motion to suppress two five gallons cans is denied.

APPENDIX C

Respondent's Motion To Suppress (In Part)

MOTION TO SUPPRESS

The defendant, Fred Schonagle, moves this Court, pursuant to Section 54-33F of the Connecticut General Statutes to suppress as evidence the following:

* * * *

2. All tangible objects seized as a result of the search of the defendant and his premises known as 265 Boston Avenue, Bridgeport, Connecticut on September 26, 1977 or at any other times including but not limited to:

a) sample of soil taken from the northwest corner of 265 Boston Avenue, Bridgeport, Connecticut.

b) piece of brick taken from building at northwest corner of 265 Boston Avenue, Bridgeport, Connecticut.

c) two 5 gallon cans

d) any evidence concerning the existence of a white van.

* * * *

WHEREFORE, the defendant requests that this motion be granted.

THE DEFENDANT

BY SALVATORE C. DePIANO
DePiano, Petrucelli & Palmesi

Filed December 17, 1979

ORDER

1/3/80 Stand/over to time of trial (Hull, J.)

The foregoing Motion, having been heard, is hereby ordered that paragraphs 1.a) b) c) & d) are Denied; Paragraphs 2.a) & b) are Granted; paragraph 2.c) Denied; paragraph 2.d) Denied without prejudice; paragraph 3. is withdrawn without prejudice.

GRANTED in part; DENIED in part.

BY THE COURT (Callahan, J.)

J. A. Rasmussen
Temp. Asst. Clerk

1/2/80

Office - Supreme Court, U.S.
FILED
JUL 25 1983
ALEXANDER L. STEVAS
CLERK

No. 82-2117

In The

Supreme Court of the United States

October Term, 1983

STATE OF CONNECTICUT,
Petitioner,

vs.

FREDERICK SCHONAGEL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly

CONSTITUTIONAL PROVISIONS — Continued

describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Connecticut, article first, §7

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

Connecticut Rules Of Court, Rules Of The Supreme Court §3063: "Errors Considered" (1983)

The supreme court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The supreme court may in the interest of justice notice plain error not brought to the attention of the trial court.

No. 82-2117

In The

Supreme Court of the United States

October Term, 1983

STATE OF CONNECTICUT,
Petitioner,

vs.

FREDERICK SCHONAGEL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

To The Honorable Justices Of The United States Supreme Court:

The Respondent, FREDERICK SCHONAGEL, hereby files this brief in opposition to the Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Connecticut rendered in this matter on April 26, 1983.

QUESTIONS PRESENTED

Respondent-defendant was convicted of conspiracy to commit arson in the Superior Court of Connecticut. The Supreme Court of the state set the conviction aside finding that the trial court had committed constitutional error by failing to suppress two metal containers seized by the police during a warrantless search of the Respondent's business premises conducted four days after a fire had destroyed the buildings. The questions presented by this Petition for Review are:

1. Whether any exigent circumstances justified the warrantless search of the Respondent's business premises for specifically identified criminal evidence four days after a fire had destroyed the buildings.

2. Whether the Connecticut Supreme Court erred in concluding that the trial court had correctly determined that the Respondent had retained a legitimate expectation of privacy in whatever remained of his burnt property at the time of the search.

3. Whether the Connecticut Supreme Court's decision rested on independent and adequate state grounds.

STATEMENT OF THE CASE

FACTS

During the pre-dawn hours of Friday, September 23, 1977, a violent explosion followed by an intense fire destroyed two commercial buildings constituting "Tire City", an automobile tire sales and service facility owned by the Respondent in Bridgeport, Connecticut. The intensity of the blaze led firefighters to believe that an accelerant had to be involved. Despite this conclusion, however, the record does not reveal that any authority commenced an immediate arson investigation or applied for a judicial warrant to do so.

Police officers patrolling the area nearby heard the explosion, saw the "globe of flames" and rushed to the scene. Upon arrival, they noticed an individual being dragged out from behind one of the buildings whose clothes smelled strongly of gasoline. This person was 15-year-old John Velasquez of Bridgeport, who had been injured by the explosion. The officer in charge supervised the boy's removal to a hospital and also stationed a patrolman to watch the premises around the clock. This police guard remained at the site through Wednesday, September 28th.

A building official from the City of Bridgeport arrived the following morning. Without consulting the owner, he ordered the buildings demolished because their burnt-out state endangered the safety of the people in the area. As part of the contract, the wrecker was also required to remove the debris from the scene. The demolition, however, did not commence immediately because representatives of the insurance carrier requested a postponement of the wrecking in order to obtain photos and measurements of the two

buildings involved. The request was granted and no work was done until the insurance company gave the signal to proceed several hours later. The wreckers were at liberty to begin removing the debris concurrent with the demolition but chose not to do so. Instead, they commenced removal of the rubble sometime in the forenoon of Monday, September 26th. By that time, John Velasquez had recovered sufficiently to be questioned by the police. He stated that he and his brother had set the blaze at the owner's request. They allegedly caused the explosion by igniting gasoline contained in several containers provided by the Respondent.

When the police heard mention of the gasoline containers, an officer was immediately dispatched to check the ruins of "Tire City" for this incriminating evidence. The search commenced on midday of Monday, September 26th and continued through Tuesday, September 27th. No attempt was made to secure a search warrant at any time during this two day period. The police also made no attempt to halt the demolition or the removal of the debris. As a result of the search, the police seized two metal containers on September 26th and some brick and soil samples the following day. Subsequently, the Respondent was arrested and charged with conspiracy to commit arson.

At his trial, Frederick Schonagel moved to suppress all of the evidence seized pursuant to the warrantless search. The trial court, however, suppressed only the brick and soil samples taken on the second day of the search (P.A. 16)[1] and

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[1]References to the Petitioner's Brief and Appendix will be as follows:

Petitioner's Brief (P.B.)
Petitioner's Appendix (P.A.)

ruled that the warrantless seizure of the metal containers was justified by exigent circumstances. The judge apparently accepted the state's argument that the demolition and clearing of the site required immediate action by the police in order to prevent the potential loss of criminal evidence.

Following his conviction, the Respondent appealed the trial court's ruling to the Connecticut Supreme Court, which found error and ordered a new trial.

PROCEDURAL BACKGROUND

By amended information dated June 11, 1980, the Respondent was charged with conspiracy to commit arson in the second degree in violation of Connecticut General Statutes §§53a-48 and 53a-112. (P.A. 3) On December 17, 1979, he had filed a motion to suppress evidence seized during a warrantless search of his commercial premises on September 26, 1977. (P.A. 17) On July 2, 1980, the trial court rendered an oral decision granting the motion in part and denying it in part. (P.A. 16)

The Respondent was tried to a jury which rendered a verdict of guilty on July 17, 1980, and judgment entered on November 7, 1980. The Respondent appealed his conviction to the Supreme Court of Connecticut charging, **inter alia,** that the trial court's failure to suppress the metal containers seized on September 26, 1977, violated his rights under the applicable provisions of both the Constitution of the United States and the Constitution of the State of Connecticut. (P.A. 4)

On April 26, 1983, the Connecticut Supreme Court reversed the conviction ordering a new trial. **State v. Schonagel,** 189 Conn. 752, 459 A.2d 106 (1983). (P.A. 1-15)

The court found that under the circumstances the state had not met its burden of demonstrating the existence of sufficient exigent circumstances to justify the warrantless search. It also ruled that the trial court had not committed plain error by implicitly finding that the owner of burnt premises retains a legitimate expectation of privacy in his property.

ARGUMENT

SUMMARY OF ARGUMENT

The Respondent, Frederick Schonagel, respectfully urges this Court to deny the Petition for a Writ of Certiorari because the judgment of the Supreme Court of Connecticut regarding the constitutional issues raised by the warrantless search of the Respondent's business premises is in complete harmony with prior interpretations of the United States Constitution made by this Court. Since the decision is also compatible with the case law of other state and federal courts, it has not contributed to any conflict among jurisdictions, thereby requiring resolution by this Court. **See N.L.R.B. v. Pittsburgh Steel Co.,** 340 U.S. 498, 502 (1951).

In attacking the judgment of the Connecticut tribunal, the Petitioner suggests that this Court needs to redefine its decision in **Michigan v. Tyler,** 436 U.S. 499 (1978). However, the rules established in that case clearly and concisely delineated the parameters of exigent circumstances permitting warrantless searches of fire sites. That case also established that the owner of a burnt building retains his privacy rights in the premises. **Tyler** has caused no conflict in later decisions, and therefore, requires no clarification.

Lastly, since the decision of the Connecticut Supreme Court rests on both federal and state constitutional principles, independent and adequate state grounds support that ruling, militating against further review by this Court.

I. No Exigent Circumstances Justified The Warrantless Search Of The Respondent's Business Premises For Specifically Identified Criminal Evidence Four Days After A Fire Had Destroyed the Buildings.

In appealing his conviction, the Respondent stated that the trial court's failure to suppress all of the evidence seized pursuant to the warrantless search violated his rights under the fourth and fourteenth amendments to the United States Constitution as well as article first, §7 of the Constitution of Connecticut. The Petitioner alleged that the exigent circumstances exception to the warrant requirement of the fourth amendment justified the police action in this case. The gist of the prosecution's argument was that since the destroyed premises were being cleared of the debris from the fire "the police did not have the luxury of time to seek a warrant" if it wished to prevent the loss of criminal evidence. Therefore, they claimed that the good faith belief of the officers that the wreckers might remove or destroy the gasoline containers mentioned by Velasquez created a sufficient exigency to render the search and seizure reasonable. (P.B. 7) However, both in its brief and on oral argument the state failed to explain why, in light of the early suspicion of arson, the police had failed to secure a warrant to conduct an investigation during the four days which had elapsed since the fire.

In rejecting the Petitioner's exigency excuse, the justices of the Connecticut Supreme Court first noted the

well-settled principle that "anyone claiming an exemption from [the warrant] requirement bears the burden of showing the need for it," **State v. Schonagel,** 189 Conn. 752, 758, 459 A.2d 106, 110 (1983) (P.A. 6), and "that the existence of exigent circumstances is a question of fact." **Id.** at 762, 459 A.2d at 112. (P.A. 9) Accepting the Petitioner's arguments regarding the possibility of the imminent removal of evidence from the fire site, the court nevertheless denied the state's exigency claim:

> The present record rebuts exigency because it contains nothing to show that it was impossible or unreasonable for the police to obtain a temporary halt to the removal of debris while they went to get a warrant. Apparantly, the police made no such effort. The previous Friday, according to the evidence, razing of the burnt-out structure had been halted at the request of insurance investigators, even after the building inspector had determined the structure to be a hazard to the public. There was no evidence that, on the Monday of the search, a delay in completion of the removal work would have endangered the public safety, would have created additional danger, or would otherwise have been unreasonable. ... Since a police officer was already on the premises, he could have ensured that no evidence would be removed during the short time that obtaining a warrant would have taken. ... We note, as have other courts, that it is more difficult to demonstrate exigency when the claimed risk relates to the fear of removal rather than of destruction of evidence that the police want to seize without a warrant. (citations omitted)

Id. at 763, 459 A.2d at 112. (P.A. 10) Therefore, the court

concluded unanimously that "when there are reasonable alternatives to a warrantless search, the state has not satisfied its burden of proving exigent circumstances." **Id.**

The Petitioner implies that the Connecticut Supreme Court's decision is inconsistent with the rulings of this Court and that "the scope of **Michigan v. Tyler,** 436 U.S. 499 (1978), could be redefined with more precision as to the variants of exigency. . . . " (P.B. 6) However, the Petitioner has failed to state exactly which decisions of this Court the **Schonagel** decision supposedly contravenes.

In **Tyler** this Court enunciated that officials do not need a warrant to enter a burning building to fight the blaze and to investigate its cause. However, all later investigative entries and searches specifically aimed at gathering incriminating evidence are subject to constitutional probable cause and warrant requirements. 436 U.S. at 511-12. This clear and simple rule has been applied consistently and uniformly by both federal and state courts. **See Smith v. Heath,** 691 F.2d 220, 224 (6th Cir. 1982); **Donovan v. Wollaston Alloys, Inc.,** 695 F.2d 1, 5 (1st Cir. 1982); **Satchell v. Cardwell,** 653 F.2d 408, 412 (9th Cir. 1981), **cert. denied,** 102 S.Ct. 1026 (1982); **United States v. Jamieson-McKames Pharmaceuticals,** 651 F.2d 532, 541 (8th Cir. 1981), **cert. denied,** 102 S.Ct. 1709 (1982); **Burkart Randall Division of Textron, Inc. v. Marshall,** 625 F.2d 1313, 1318 (7th Cir. 1980); **Blackie's House of Beef, Inc. v. Castillo,** 659 F.2d 1211, 1225 n.16 (D.C. Cir. 1981), **cert. denied,** 455 U.S. 940 (1982); **United States v. Johnson,** 524 F. Supp. 199, 204 (D. Del. 1981); **United States v. Lawson,** 502 F. Supp. 158, 165 (D. Md. 1980); **Cronk v. State,** ____ Ind. ____ , 443 N.E.2d 882, 885 (1983); **People v. Richards,** 94 Ill. 2d 92, 445 N.E.2d 319, 322 (1983); **Commonwealth v. Frodyma,** 386

Mass. 926, 436 N.E.2d 925, 932 (1982); **People v. Bradley,** 132 Cal. App. 3d 737, 183 Cal. Rptr. 434, 438 (1982); **State v. Passerin,** 449 A.2d 192, 195-196 (Del. 1982). Therefore, there is no conflict which this Court needs to resolve.

Furthermore, the Petitioner did not claim that the fire at the Respondent's premises created the exigency on which it relies in this case. Therefore, the exigency issue addressed by **Tyler** is not relevant to this case and the Petitioner's request that this Court redefine that case is misplaced.

II. The Connecticut Supreme Court Did Not Err In Concluding That The Trial Court Had Correctly Determined That The Respondent Had Retained A Legitimate Expectation of Privacy In Whatever Remained Of His Burnt Property At The Time Of The Search.

Both at trial and on appeal, the Petitioner argued that the burnt and nearly demolished condition of the premises divested the Respondent of any reasonable expectation of privacy, thereby legitimizing the warrantless search. The Connecticut Supreme Court rejected this argument. First, it noted that by suppressing the brick and soil samples, the trial judge had necessarily concluded as a matter of fact that the owner had not relinquished or lost his expectation of privacy in the premises. Since the state had not objected to that portion of the judge's ruling on appeal, the court indicated that it could overturn that finding "only if we found it to be plain error. The record does not support such a conclusion." 189 Conn. at 759, 459 A.2d at 110. (P.A. 7) Under the applicable Connecticut Rules of Court, the supreme court "may in the interests of justice notice plain error not brought to the attention of the trial court."

Connecticut Rules of Court §3063 (1983); **Valley v. Fazzina,** 187 Conn. 423, 428, 446 A.2d 1068, 1070 (1982). The Connecticut Supreme Court has established that only two situations may trigger plain error review. The first is "where a new constitutional right not readily foreseeable has arisen between the time of trial and appeal.... The second 'exceptional circumstance' may arise where the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial." **State v. Evans,** 165 Conn. 61, 70, 327 A.2d 576, 581 (1973); **State v. Nardini,** 187 Conn. 513, 516, 447 A.2d 396, 398 (1982); **Cf. Chaplin v. Balkus,** 189 Conn. 445, 447, 456 A.2d 286, 287 (1983). The same plain error reasoning also applies in federal courts. **See United States v. McCaskill,** 676 F.2d 995, 1002 (4th Cir.), **cert. denied,** 103 S.Ct. 381 (1982). [The claimed error must be a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done ... ."] This reasoning makes it clear that the rule is concerned with the fundamental rights of an individual, not the state. Furthermore, the Petitioner has failed to indicate how the fairness of the trial was affected by the trial court's factual finding that the Respondent had not relinquished his privacy rights in his burnt building.

The plain error issue was neither briefed nor argued to the Connecticut Supreme Court and the Petitioner raises it for the first time in this Petition for Review. However, on its own motion, that court considered the matter and concluded that no plain error had been committed.

In examining the record the justices recognized that, at the time of the search, "the condition of the premises resulted from both the fire and the dismantling operation

ordered by the Bridgeport Building Inspector." 189 Conn. at 761, 459 A.2d at 111. (P.A. 8) Citing both **Tyler** and its own state precedent, the court explained that a fire does not eliminate the owner's reasonable expectation of privacy in his building. **Id.** Similarly, the administratively ordered wrecking operation was held to not necessarily eradicate the owner's privacy rights. **Id.** (P.A. 9)

The court then addressed the Respondent's subjective expression of his expectation of privacy. This Court stated recently that an individual's own conduct must be considered in determining whether he has exhibited a subjective expectation of privacy. **United States v. Knotts,** ____ U.S. ____, 103 S.Ct. 1081 (1983); **United States v. Brock,** 667 F.2d 1311, 1320 n.8 (9th Cir. 1982); **Smith v. Maryland,** 442 U.S. 735, 740 (1979). The Connecticut justices noted that at the time of the search the Respondent had recommenced doing business on the premises and that there was no indication of a "consensual abandonment" of the right to privacy. 189 Conn. at 760, 459 A.2d at 111. (P.A. 8) Therefore, they concluded:

> In finding the defendant retained such an expectation, the trial court might well have concluded that in the confused aftermath of the blaze the defendant did not see the full implication, as far as his privacy interests were concerned, of the dismantling operation. His presence on the premises, at the time of the search, is as consistent with exercise of his right to privacy as it is with his abandonment of any such expectation. We cannot say, under the circumstances, that the court's finding was plainly in error.

189 Conn. at 762, 459 A.2d at 111-112. (P.A. 9)

The Petitioner has cited no authority — other than its own interpretation of the facts — for the proposition that this finding "was plain error of constitutional significance." It is well-settled that this Court will not grant a Writ of Certiorari merely to review evidence and draw inferences from it. **Crumady v. The J.H. Fisser,** 358 U.S. 423, 429 (1959); **General Talking Picture Corp. v. Western Electric Co.,** 304 U.S. 175, 178 (1937).

III. The Connecticut Supreme Court's Decision Rested On Independent And Adequate State Grounds.

As noted previously, the Connecticut Supreme Court's decision in this case was fully consistent with this Court's prior interpretations of the fourth and fourteenth amendments to the United States Constitution. However, even if it were assumed, **arguendo,** that the decision of the court went beyond the requirements of the federal constitution, the Petition for Review should be denied because the Connecticut court clearly relied on the Connecticut Constitution to at least the same degree it relied on federal law. The justices prefaced their analysis of the warrantless search by stating that "the fourth amendment, and its state counterpart, article first, §7 forbid unreasonable searches and seizures." 189 Conn. at 758, 459 A.2d at 110. (P.A. 6) They then cited both federal and state authorities for the legal principles discussed. The Connecticut court has explained previously that when the provisions of the state and the federal constitutions are identical, its decisions regarding issues raised by both also rely on both. **Roundhouse Construction Corp. v. Telesco Masons Supplies Co., Inc.,** 170 Conn. 155, 157, 365 A.2d

393, 394, **cert. denied,** 429 U.S. 889 (1976). The court also noted in **Roundhouse** that in such an instance it looks to the decisions of the United States Supreme Court as "very persuasive if not controlling authority." **Id.** at 158, 365 A.2d at 394. In a later case, the justices explained that the "due process clause of the Connecticut Constitution shares but is not limited by the content of its federal counterpart." **Fasulo v. Arafeh,** 173 Conn. 473, 475, 378 A.2d 553, 554 (1977). However, as in **Schonagel,** the court cited both state and federal cases to support this conclusion. **See also Society for Savings v. Chestnut Estates, Inc.,** 176 Conn. 563, 569 n.5, 576 n.9, 409 A.2d 1020, 1023 n.5, 1026 n.9 (1979).

A similar approach is taken by other states when state constitutional provisions parallel their federal counterparts. **See, e.g., State v. Fitzsimmons,** 94 Wash. 2d 858, 620 P.2d 999, 1000 (1982); **People v. Krivda,** 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521, **cert. denied,** 412 U.S. 919 (1973); **People v. Peques,** 412 Mich. 851, 312 N.W.2d 83, 84 (1981); **People v. Beavers,** 393 Mich. 554, 227 N.W.2d 511, 516, **cert. denied,** 423 U.S. 878 (1975). ["While the result reached today reflects an analysis of Federal case authority, our conclusion is based upon the Michigan Constitution and the protection afforded the people of this state against unreasonable searches and seizures."]; **Commonwealth v. Campana,** 455 Pa. 622, 314 A.2d 854, 855, **cert. denied,** 417 U.S. 969 (1974):

> There are, of course, indications in some of the opinions supporting our judgments that a basis for the judgments was to be found in federal constitutional problems. However, there are also separate reason [sic] advanced for the result that do not stand on a view of federal constitutional

requirements.

> Our supervisory power over state criminal proceedings is broad, and this Court need not, as a matter of state law, limit its decision to the minimum requirements of federal constitutional law.

This must be contrasted with the situation in which the state court makes no reference to state statutory or constitutional grounds and is merely analyzing a United States Supreme Court decision. **See Fare v. Michael C.,** 442 U.S. 707, 717, **reh'g denied,** 444 U.S. 887 (1979).

Even if this Court determines that Connecticut restricts the police to a greater extent than is required by the federal constitution, it cannot alter the state's policy since it is supported by state law. This Court has repeatedly recognized that its interpretation of the United States Constitution does not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." **Pruneyard Shopping Center v. Robins,** 447 U.S. 74, 81 (1980); **Connecticut v. Johnson,** ____ U.S. ____, 103 S.Ct. 969, 974 n.9 (1983) ["State courts, of course are free to interpret their own constitutions and laws to permit fewer applications of the harmless error rule than does the Federal Constitution."]; **Martinez v. California,** 444 U.S. 277, 282 (1980). The United States Constitution simply "defines the minimum level of rights that citizens are afforded." **Cologne v. Westfarms Associates,** 37 Conn. Supp. 90, 100, 442 A.2d 471, 477 (1982). However, in **Minnesota v. Clover Leaf Creamery Co.,** 449 U.S. 456 (1981), the Justices of this

Court explained that while a "state court may, of course apply a more stringent standard of review as a matter of state law 'under the state's equivalent to the federal constitution,' it is not free to impose greater restrictions as a matter of federal constitutional law than this Court has imposed." **Id.** at 460 n.6. **See also Fare v. Michael C., supra; North Carolina v. Butler,** 441 U.S. 367, 377 (1979); **Oregon v. Hass,** 420 U.S. 714, 719 (1975).[2] Since the restrictions on the police imposed by **Schonagel** were based on Connecticut rather than purely federal precedent, they need not be reviewed by this Court.

Even prior to this Court's decision in **Pruneyard,** the State of Connecticut had explicitly asserted its right to go beyond the minimum requirements of federal law in the area of individual constitutional rights:

> The equal protection clauses of both the United States and Connecticut constitutions having a like meaning, the decisions of the United States Supreme Court defining federal constitutional rights are at the least, persuasive authority, although we fully recognize the primary independent vitality of the provisions of our own constitution. Paraphrasing the language of the California Supreme Court in **People v. Longwill,** 14 Cal. 3d 943, 951 n.4, 538 P.2d 753: In the area of fundamental civil liberties — which includes all protections of the declaration of rights contained in article first of the Connecticut constitution — we sit as a court of last resort, subject only to the qualification that our interpretations may not

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[2]On July 5, 1983, the Connecticut Supreme Court implied its willingness to expand the rights guaranteed by the sixth amendment on state constitutional grounds in **State v. Biller,** 190 Conn. 594, 618 n.12, ____ A.2d ____, ____ n.12 (1983).

> restrict the guarantees accorded the national citizenry under the federal charter. In such constitutional adjudication, our first referent is Connecticut law and the full panoply of rights Connecticut residents have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but they are to be followed by Connecticut courts only when they provide no less individual protection than is guaranteed by Connecticut law.

Horton v. Meskill, 172 Conn. 615, 641-42, 376 A.2d 359, 371 (1977). Similarly in **Fasulo v. Arafeh,** 173 Conn. 473, 378 A.2d 553 (1977), the court granted mental patients rights arguably exceeding existing federal safeguards, once again noting that "[t] he due process clause of the Connecticut constitution shares but is not limited by the content of its federal counterpart." **Id.** at 475, 378 A.2d at 554. **See also Doe v. Maher,** 8 C.L.T. No. 18 at 7 (May 3, 1982) [Medicaid payments for abortions]: **Fox v. First Bank,** 8 C.L.T. No. 6 at 14 (Feb. 8, 1982) [Due process requirements in repossessing automobile].

The use of state constitutional provisions to expand civil liberties is also reflected in the decisions of other states. **See, e.g., State v. Opperman,** 247 N.W.2d 673 (S.D. 1976) [rejecting this Court's decision in **South Dakota v. Opperman,** 428 U.S. 364 (1976) regarding inventory searches of automobiles]; **State v. Vernon,** 385 So. 2d 200, 204 (La. 1980) [Proof beyond reasonable doubt required for finding waiver of privilege against self-incrimination]; **Commonwealth v. Bussey,** 486 Pa. 221, 404 A.2d 1309

(1979); **State v. Benoit,** ____ R.I. ____, 417 A.2d 895 (1980); **State v. Miyasaki,** 62 Hawaii 269, 614 P.2d 915 (1980); **Reeves v. State,** 599 P.2d 727, 734 (Alaska 1979); **State v. Helfrich,** 183 Mont. 484, 600 P.2d 816 (1979). In **Commonwealth v. Campana,** 455 Pa. 622, 314 A.2d 854, **cert. denied,** 417 U.S. 969 (1974), the court invoked its judicial supervisory powers rather than the state constitution to adopt a "same transaction" test for double jeopardy analysis. **See also State v. Borst,** 278 Minn. 388, 154 N.W.2d 888 (1967).

Similarly, Connecticut's decision to develop its own state exigent circumstances test is demonstrated in a case decided on June 21, 1983. **State v. Guertin,** 190 Conn. 440, ____ A.2d ____ (1983). After a lengthy discussion of the various existing "tests" for finding exigent circumstances, the court adopted the rule developed by the Supreme Court of Appeals of West Virginia in **State v. Canby,** 252 S.E.2d 164, 167 (W.Va. 1979) requiring a "totality of circumstances" approach to determine the reasonableness of police conduct. 190 Conn. at 453. The court's criterion is "what a **reasonable,** well-trained police officer would believe, not what the arresting officer actually did believe." **Id.** (emphasis original) The **Canby** rule also provides that "unnecessary police-created exigencies are not exceptions to the warrant requirement." **Id.** Noting that **Canby** "was decided on the basis of the West Virginia Constitution," **Id.,** the Connecticut Supreme Court reiterated:

> We have in the past, including the recent past, expressed the view that article first §7 of the Connecticut Constitution provides the same protection as the fourth amendment. ... In any event, since the **Canby** test closely reflects our latest expression on the kinds of circumstances

> which would justify a warrantless entry into a building; see **State v. Schonagel,** supra, 763; we are disposed to follow it. (citations omitted)

190 Conn. at 454.

Since **Guertin** cited **Schonagel** and contains a marked absence of federal precedent, it can be inferred that the court also did not base the **Schonagel** decision solely on federal constitutional grounds. Therefore, the decision is supported by adequate state grounds and does not need to be reviewed by this Court, even if the enunciated rules exceed minimum federal constitutional parameters.

CONCLUSION

For the reasons stated above, this Court should decline to issue a Writ of Certiorari to the Supreme Court of Connecticut to review the issues raised in this Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three (3) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari were mailed, postage pre-paid, on this 22nd day of July, 1983, to Richard F. Jacobson and Donald A. Browne, Office of the State's Attorney, 1061 Main Street, Bridgeport, Connecticut 06604.

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